BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH D. BOSQUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,343
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 2, 2007 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded a 15 percent impairment of function to the left lower extremity at the ankle for the injuries suffered on September 19, 2003. Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas. The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). The Board heard oral argument on May 2, 2007. The parties agreed at oral argument to the Board that, if the award is limited to the lower extremity at the ankle, then the award will be computed based upon the schedule contained in K.S.A. 44-510d, and limited to the lower leg not to exceed 190 weeks.

ISSUES

What is the nature and extent of claimant's injuries and disabilities? Claimant was limited to a functional disability to the left lower extremity at the ankle. Claimant argues that he has suffered injuries not only to his left lower extremity at the ankle, but also to his low back and right knee. Claimant contends he is entitled to a permanent partial disability under K.S.A. 44-510e for the low back injury, with both a task loss and a wage loss proven in this record. Respondent argues the award should either be affirmed, or the functional rating to the ankle be reduced to 10 percent based on the medical opinion of board certified orthopedic surgeon C. Reiff Brown, M.D.

FINDINGS OF FACT

Claimant worked for respondent as a corrections officer when, on September 19, 2003, he fell down some stairs and injured his left ankle. There is no dispute that this injury arose out of and in the course of his employment. Claimant experienced immediate pain and swelling in his left ankle. Claimant initially treated with his family physician, Dennis Kepka, M.D. Dr. Kepka placed claimant in an air cast and placed him on restricted duty. Claimant was eventually referred to Dr. Garramone, an orthopedist in Manhattan Kansas.

Dr. Garramone prescribed medication, immobilization of claimant's ankle and foot, and physical therapy. Claimant was experiencing severe pain "in the arch of the left ankle, and then also on the outer part of the ankle where the ball meets the foot."[1] Approximately one month after the initial injury, because he was limping, claimant began having right knee problems.[2]

Claimant first began receiving physical therapy on November 11, 2003. The initial treatment was for the ankle and was provided by physical therapist Scott Hipp. Claimant last received therapy (during this session) on December 2, 2003. Claimant canceled a visit on December 5, 2003, and was a no show for the December 9 and 12 visits. Claimant's chart was closed on December 29, 2003, due to lack of contact.

Dr. Garramone eventually recommended surgery for claimant's ankle, but the surgery was not approved by the adjuster for the State Self Insurance Fund. Claimant was then referred to Dr. Fred Smith, a general practitioner with the Hays Orthopedic Group. Dr. Smith provided no treatment and referred claimant back to Dr. Garramone. Claimant was continued with medication and restrictions. Dr. Garramone again recommended surgery which was again refused. Claimant was next referred to Gregory A. Woods, M.D. (Dr. Woods is in the same office as Dr. Smith in Hays). Dr. Woods provided no treatment, but did refer claimant for treatment to Wichita, Kansas. Claimant continued working for respondent until the first week of January 2004. At that time, Dr. Garramone stated he no longer wanted to mask claimant's injury with medication and took claimant off all medications.

Claimant was referred to board certified orthopedic surgeon Kent Heady, M.D., on March 29, 2004. Claimant presented at this first examination with pain in both ankles. Dr. Heady treated claimant with an air cast stirrup type brace for his ankle and referred claimant for 6 weeks of additional physical therapy. There was no significant improvement. Dr. Heady then tried to immobilize claimant's ankle with a short leg cast. By April 28, 2004,

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[1] R.H. Trans. at 19-20.

[2] R.H. Trans. at 20-21.

claimant displayed minimal improvement. Claimant was taken out of the cast and put into a Cam boot, which is like a removable cast walker. Claimant was also set up with an Arizona brace. When claimant was examined by Dr. Heady in June 2004, claimant had only been in the Arizona brace for about two weeks. When Dr. Heady examined claimant on July 26, 2004, claimant had been in the brace for 8 weeks, but was receiving no relief from his pain. Claimant was also developing some secondary deformity of a flat-foot type with mid-foot abduction.

Dr. Heady felt it was time to proceed with surgical reconstruction of the posterior tibial tendon to prevent further progression of the deformity. He also planned a medial sliding calcaneal osteotomy and a transfer of the flexor digitorum longus tendon to the navicular bone to reconstruct the posterior tibial tendon. Claimant underwent the surgery on August 10, 2004. Two weeks post surgery, claimant seemed to be doing well. By 6 weeks post surgery, claimant was having very little pain. He was again placed in a Cam boot. In October 2004, 10 weeks post surgery, claimant was having some pain when he ambulated. Claimant was referred back to Scott Hipp for additional physical therapy on the ankle beginning October 25, 2004. The physical therapy extended through February 4, 2005. Claimant was a no show for the February 10, 2005 visit. The file was closed on February 21, 2005, due to a lack of activity. There was no mention of knee or back pain in the physical therapy notes.

Dr. Heady's office notes of December 27, 2004, indicated that claimant, for the first time, notified Dr. Heady of right knee pain associated with an altered gait. Claimant was also having pain in his back and shoulder, which claimant attributed to using crutches for a prolonged period following the surgery. Dr. Heady felt that this was a reasonable causal attribution, and indirectly related to claimant's injury. The December 27 note contained the only reference to claimant's right knee and back contained in Dr. Heady's file.

Dr. Heady restricted claimant to sedentary work, standing and walking less than one-third of the day. He felt claimant deserved a rating, but could not find a suitable category in the tables of the fourth edition of the AMA *Guides*[3] to give claimant a rating. On August 4, 2005, Dr. Heady performed a second surgery on claimant's ankle to remove a screw from claimant's left calcaneus. He last saw claimant on August 18, 2005. Dr. Heady acknowledged it is quite common for a person with foot or ankle problems to have low back pain while using a crutch or walking with an altered gait.

Claimant was referred by his attorney to board certified emergency and occupational medicine specialist P. Brent Koprivica, M.D., for an examination on February 7, 2006. In the history, Dr. Koprivica was advised that claimant had suffered an injury to his low back in 1979 while working for General Motors. Claimant had acknowledged at regular hearing that he suffered this injury, but testified that there were no long-term problems associated

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

with this injury. Dr. Koprivica was not aware of claimant's low back injury while working for Exide in 1989 or a problem with claimant's back in 1993 while working at Holmes Corporation.

Dr. Koprivica diagnosed claimant as post-surgery on his left ankle. He also indicated progressive problems with claimant's low back and right knee. For the left ankle, Dr. Koprivica rated claimant at 21 percent of the left foot or 15 percent to the lower extremity. He referred to Table 64, page 86 of the fourth edition of the AMA *Guides*[4] in diagnosing claimant with "severe ligamentous instability". For the right knee, he assessed claimant with a 5 percent lower extremity impairment after referring to Table 62, page 83 of the fourth edition of the AMA *Guides*.[5] However, Dr. Koprivica acknowledged that he did not have x-rays of the right knee available for review at the time he assessed the impairment. He also rated claimant with a 5 percent whole body impairment for mechanical back pain, referencing Table 72, page 110 of the *Guides*.[6]

Dr. Koprivica restricted claimant to sedentary work, limiting standing or walking to less than 30-minute intervals, captive sitting was limited to intervals of less than two hours and recommended flexibility to change from standing to sitting and back to standing. He suggested claimant rarely climb, and should avoid squatting, crawling and kneeling entirely. Lifting activities were limited to the medium physical demand level of activity. When reviewing the task list provided by vocational expert Doug Lindhal, Dr. Koprivica found claimant unable to perform 38 of 59 tasks, for a 64.4 percent task loss. Dr. Koprivica used the DRE method of rating claimant's low back, as it is the preferred method under the AMA *Guides*.[7]

Claimant was referred by respondent to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on September 6, 2006. Dr. Brown rated claimant's left lower extremity at 10 percent for the ankle injury. He restricted claimant from frequent walking, stair and ladder climbing, running and squatting due to the ankle injury. He also rated claimant as having a 5 percent permanent partial impairment resulting from his chronic low back strain, pursuant to the fourth edition of the AMA *Guides*.[8] He placed a 60-pound weight restriction on claimant due to the back strain. Dr. Brown acknowledged that if he followed the *Guides*, claimant would fall in the DRE Category I, which would result in a zero percent impairment. However, Dr. Brown stated that in adopting Category II, he

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[4] AMA *Guides* (4th ed.).

[5] AMA *Guides* (4th ed.).

[6] AMA *Guides* (4th ed.).

[7] Koprivica Depo. at 28.

[8] AMA *Guides* (4th ed.).

was able to show that there was an abnormality in claimant's back, which he attributed to claimant's work injury and the resulting antalgic gait. He determined that claimant, having limped for three years, was at maximum medical improvement and the limp was probably permanent. Dr. Brown assessed no impairment to claimant's right knee. He determined that Table 62 of the AMA *Guides* can only be used when x-rays are available to measure the width of the joint. No x-rays were available of claimant's right knee. He also noted that claimant had no history of direct trauma to the right knee and no crepitation. Without those findings, Table 62 would not be applicable to assess claimant a rating. In reviewing the task list prepared by vocational expert Dan Zumalt, Dr. Brown found claimant could not perform 15 of 71 tasks, for a 21.1 percent task loss.

After the injury, claimant continued to work for respondent until the first week of January 2004. At that time, Dr. Garramone determined it was not appropriate to continue claimant on the medications. Claimant's employment with respondent was terminated in December 2004. Claimant was released from treatment with Dr. Heady on March 28, 2005. By March 13, 2005, claimant was working for Swift Trucking, driving a semi-truck. Claimant left Swift Trucking on July 10, 2005. In the 17.16 weeks claimant worked for Swift Trucking, he earned a total of $7,666.41, which equates to $446.76 per week. This amount, when compared to claimant's average weekly wage of $769.58, equates to a wage loss of 42 percent. Claimant left his job with Swift Trucking because it was causing hardship at home. He then purchased his own tractor and trailer and became self-employed on approximately August 11, 2005. While self-employed, claimant took draws of between $300 and $500 per week. Claimant continued in this self-employment status through 2005. He claims, after deducting for expenses, maintenance and repairs, that he lost income in 2005. For the year 2006, claimant has regularly taken a weekly draw of $500.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[9] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[13]

However, the Kansas Supreme Court, in *Stockman,*[14] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[11] K.S.A. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[14] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an intervening cause, it would not be compensable.[15]

However, when a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[16]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[17]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[18]

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[19]

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[15] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[16] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[17] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[18] K.S.A. 44-510e(a).

[19] K.S.A. 44-510e.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[20] and *Copeland*.[21] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[22]

> K.S.A. 44-510d contains the schedule for compensation for certain permanent partial disabilities. Included in that schedule are loss of, or loss of use of, certain body members including the arms. Shoulders, however, are not mentioned. K.S.A. 44-510e covers compensation for permanent partial general disabilities, and thus covers those not included in the 44-510d schedule. If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.[23]

ANALYSIS

On September 19, 2003, claimant suffered an accidental injury which resulted in significant trauma to his left ankle. Both Dr. Koprivica and Dr. Brown rated claimant's impairment pursuant to the fourth edition of the AMA *Guides*,[24] with Dr Koprivica rating claimant at 15 percent to the lower extremity and Dr. Brown rating claimant at 10 percent to the lower extremity. The Board finds the rating of Dr. Koprivica to be the more persuasive and finds claimant has suffered a 15 percent permanent partial disability on a

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[20] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[21] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[22] *Id.* at 320.

[23] *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

[24] AMA *Guides* (4th ed.).

functional basis to the left lower extremity at the ankle. This equates to a 6 percent disability to the body.

As a result of this injury and the resulting surgeries, claimant was forced to use crutches for an extended period, and later developed an antalgic gait. Both the use of crutches and the antalgic gait contributed to claimant developing low back pain, which both Dr. Koprivica and Dr. Brown rated at 5 percent to the whole body pursuant to the fourth edition of the AMA *Guides*.[25]

Claimant alleges added impairment resulting from the difficulties experienced with his right knee. Dr. Koprivica rated claimant's right knee at 5 percent to the lower extremity. However, Dr. Brown testified that it was inappropriate to rate the knee in this instance without having x-rays of the knee. As there were no x-rays taken of claimant's right knee, the rating by Dr. Koprivica is found to be without support and, therefore, inappropriate. Claimant has failed to prove that he suffered a permanent impairment to the right knee from these injuries. In calculating the impairment for both the left ankle and the back, the Board finds claimant has suffered an 11 percent permanent partial disability to the whole body on a functional basis as a result of the injuries and complications from the accident on September 19, 2003.

Respondent was unable to accommodate the restrictions placed on claimant in this matter. His employment was ended with respondent in December 2004, but he had not been able to work since January 2004. After undergoing two surgeries to his left ankle and several sessions of physical therapy, claimant was unable to withstand the rigors of respondent's job. He obtained employment with Swift Trucking, driving a semi, on March 13, 2005. While he was able to withstand the physical demands of a truck driver, the demands of driving adversely impacted claimant's personal life. He was forced to quit Swift Trucking. He then purchased a tractor and trailer and became self-employed, but claims his income dropped dramatically. Even though claimant continues to draw up to $500 per week, he claims to have no income after deducting expenses and repairs. The Board finds claimant's job as a truck driver for Swift Trucking constitutes a good faith effort to obtain employment after his termination from respondent. Pursuant to K.S.A. 44-510e, claimant's actual wage will be used in computing the work disability award. Claimant's wages earned while working for Swift Trucking resulted in a wage loss of 42 percent. Claimant's draw while self-employed is confusing at best. While claimant is working full-time as an owner-operator, his income claims from that employment are inappropriately self-serving and not presented in good faith. The Board finds a more accurate representation of claimant's income comes from the wages earned while with Swift Trucking. The Board, therefore, will use the wages claimant earned while working for Swift Trucking as the proper indication of claimant's wage loss.

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[25] AMA *Guides* (4th ed.).

With regard to claimant's task loss, the Board finds no reason to place greater weight on the opinion of either Dr. Koprivica or Dr. Brown. The Board will, therefore, average the task loss opinions of both, with a resulting task loss of 42.5 percent.

CONCLUSION

The Board finds claimant has suffered an 11 percent permanent partial functional disability to the whole body for the injuries to his left ankle and low back, with no permanent impairment for the injuries to claimant's right knee. Claimant has also suffered a 42.25 percent permanent partial work disability as the result of those injuries. As claimant's injuries are both to a scheduled member and a nonscheduled portion of the body, the computation of the award will be under K.S.A. 44-510e.

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.[26]

The Award of the ALJ will be modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated February 2, 2007, should be, and is hereby, modified to award claimant an 11 percent permanent partial disability on a functional basis and a 42.25 percent permanent partial work disability for the injuries suffered on September 19, 2003.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kenneth D. Bosquez, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, for an accidental injury which occurred on September 19, 2003, and based upon an average weekly wage of $769.58, for 52.29 weeks of temporary total disability compensation at the rate of $396.70 per week totaling $20,743.44 (pursuant to the stipulation of the parties), followed by 159.58 weeks at the rate of $440.00 per week totaling $70,215.20 for a 42.25 percent permanent partial general disability, making a total award of $90,958.64.

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[26] *Bryant, supra.*

As of June 29, 2007, there is due and owing claimant 52.29 weeks of temporary total disability compensation at the rate of $396.70 per week totaling $20,743.44, followed by 144.71 weeks of permanent partial disability compensation at the rate of $440.00 per week totaling $63,672.40, for a total of $84,415.84, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,542.80 is to be paid for 14.87 weeks at the rate of $440.00 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and their determinations that claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent, including injuries to his left ankle and back, and that claimant is entitled to the percentages of functional impairment for his injuries and may be entitled to a work disability for his nonscheduled back injury. However, we disagree with the majority's conclusion that claimant's percentage of functional impairment for his scheduled injury to his lower extremity should be combined with his percentage of functional impairment for his general body injury to his back for a single permanent partial disability award based upon the total of all his impairments. We likewise disagree that his work restrictions and resulting task loss for his scheduled injury should be combined with the restrictions and resulting task loss from his nonscheduled injury when determining claimant's work disability percentage under K.S.A. 44-510e. We read *Casco* to require the ankle injury to be compensated as a separate scheduled injury.

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities.

> If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> . . . .
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> K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[27]

Applying the "secondary injury rule," the Supreme Court in *Casco* found the claimant sustained simultaneous parallel injuries to his upper extremities (shoulders). Nevertheless, instead of combining the permanent impairment of function percentages for these two shoulder injuries into a single percentage of functional impairment to the body as a whole, the court concluded that "the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d."[28] As such, the so-called parallel injury rule was not applied so as to take the parallel upper extremity injuries out of the schedule and compensate them as a general body disability under K.S.A. 44-510e.

In *Casco*, when discussing *Honn*[29] and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

> The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waived [*sic*] home and exempted from traversing to second and third bases, thus improperly converting a single into a home run.[30]

The majority, by combining the injury to the lower extremity with the back injury and awarding a general body disability, is skipping over K.S.A. 44-510d and, in effect, converting a single into a home run.

Because the lower leg is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to this extremity must be compensated according to the schedule at

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[27] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, *rev. denied* ___ Kan. ___ (2007).

[28] *Id.*, Syl. ¶ 9.

[29] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

[30] *Casco* at 527.

the 190-week level. The back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a direct consequence of work-related accidents and aggravations. Nevertheless, claimant's left lower extremity injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from his lower extremity injury is compensable as a separate scheduled injury based upon his percentage of functional impairment for that injury alone.

As for the back, claimant is entitled to an award of compensation for the greater of either the percentage of permanent partial functional impairment or his percentage of work disability. As the aggravation of claimant's preexisting back condition resulted in additional work restrictions, claimant is entitled to a work disability if that injury resulted in a loss of his ability to earn wages of over 10 percent of his pre-injury average weekly wage and a loss of ability to perform any of the job tasks he performed during the relevant 15 years before his accidental injury. Unfortunately, as this case was litigated before the Kansas Supreme Court's decision in *Casco* was issued, the parties did not attempt to separate what job tasks claimant lost the ability to perform due to the back injury alone without also considering the restrictions given because of the lower extremity injury. As such, in the interest of fairness, this case should be remanded to the ALJ with instructions that the record be reopened to allow the parties to present evidence of what wage and task loss claimant has solely as a result of the injury to his back.

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge